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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1233

REA EXPRESS, INC., A BANKRUPT, PETITIONER

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-22a) is reported at 524 F.2d 54.[1] The opinions and orders of the Civil Aeronautics Board (Pet. App. 23a-140a) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1975. A petition for rehearing with suggestion for rehearing *en banc* was denied on December 1, 1975. The petition for a writ of certiorari was filed on February 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1]References are to the separate Appendix filed with the petition.

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QUESTION PRESENTED

Whether the court of appeals correctly found that the Civil Aeronautics Board's decision to terminate the temporary authority granted exclusively to REA Express, Inc., to engage in a form of air-cargo service known as "air express," and to disapprove agreements between REA and United States airlines under which this service was provided, is supported by substantial evidence.

STATUTE INVOLVED

The relevant sections of the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 *et seq.*, are set forth in the Appendix, *infra*, pp. 1a-3a.

STATEMENT

A. Background

"Air express" is a term used to describe a priority air-cargo service. The service was offered on a door-to-door basis, and included all ground services required to make the shipment and delivery to the consignee. The exclusive provider of air express service was REA Express, Inc., which offered the service pursuant to agreements with the various United States air carriers (Pet. App. 11a, 96a).

In 1941, the Civil Aeronautics Board found that by providing this service, which is the oldest method of shipping air cargo, REA was acting as an indirect air carrier. The Board, pursuant to Section 1(2) of the Civil Aeronautics Act of 1938,[2] granted REA a temporary exemption to continue providing this service. In 1943, the Board approved, with certain modifications, the

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[2] *Railway Express Agency, Grandfather Certificate*, 2 C.A.B. 531. Section 1(2) of the Civil Aeronautics Act of 1938, 52 Stat. 977, is now contained in Section 101(3) of the Federal Aviation Act of 1958.

agreements between REA and the air carriers, and continued REA's temporary exemption.[3] Since 1943, the airlines and REA have renewed their agreements at five-year intervals, and have obtained the Board's approval for these agreements pursuant to the Board's authority to approve or disapprove contracts entered into by carriers. See Section 412(b) of the Federal Aviation Act of 1958, 49 U.S.C. 1382(b). REA's temporary exemption also has been periodically extended (Pet. App. 10a, n. 1). In this fashion, air express was established as a unique service and REA was granted the exclusive right to provide it. The Board, however, explicitly made extension of REA's temporary exemption "subject to revocation by the Board at any time if it deems that the exemption * * * granted is no longer in the public interest." *Air Freight Forwarder Case*, 9 C.A.B. 473, 479.

Air express service was formerly the only method by which cargo could be shipped by air carrier. In 1943, however, the Board, as part of its policy of developing and improving air cargo service, approved airport-to-airport "air freight" services by air carriers. The Board also approved "air freight forwarder" service in 1948 (Pet. App. 12a).[4] These new services affected the market in such a way that air express service "eventually develop[ed] primarily into a door-to-door small package service, with the average shipment weighing only 27 pounds and moving approximately 500 miles" (Pet. App. 12a; see Pet. App. 113a-114a).

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[3] *Railway Express Agreements*, 4 C.A.B. 157.

[4] Air freight forwarders are "authorized to pick up freight from shippers at a given point, assemble and consolidate the shipments for transfer by direct air carrier and, upon arrival of the consolidated shipment at its designation, perform break-bulk and distribution functions" (Pet. App. 12a).

On June 30, 1969, the "air express" agreement between REA and the airlines expired, but the agreement was extended on an interim basis during the course of prolonged negotiations.[5] In June 1970, REA and the airlines submitted for Board approval amendments to the agreement together with new tariffs containing substantial rate increases. However, REA also asked the Board to restructure the air express arrangement by making the agreement permanent, by giving REA independent authority to set rates free of veto by the air carriers, and by authorizing REA to act both as the exclusive provider of air express services and as an air freight forwarder. The air carriers opposed these proposals.

The Board, finding insufficient justification for the proposed rate increases, suspended the tariffs and instituted an investigation to determine whether continued authorization of REA's exclusive air express service and approval of the new agreement would be in the public interest (Pet. App. 136a).[6] *Express Service Investigation* (Docket 22388). It also commenced a separate investigation of air express rates and the division of revenues between REA and the air carriers. *Express Rate Investigation* (Docket 22387).

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[5]There were disputes concerning such matters as REA's escalating costs, its deteriorating financial position, and the proper division of revenues between REA and the airlines.

[6]Once the Board had suspended the new tariffs, the revised agreement collapsed and REA refused to extend the existing agreement any further. Several shipper groups thereupon obtained a preliminary injunction preventing REA and the airlines from terminating air express services. *Allied American Bird Co. v. REA Express, Inc.*, D. D.C., Civ. No. 2289-70, decided August 12, 1970. Shortly thereafter, the parties stipulated to an interim extension of the existing agreement (Agreement C.A.B. 17935) until 60 days after the date of final orders in the Board's proceedings (including judicial review), and on the basis of that agreement, obtained a dismissal of the preliminary injunction.

B. Findings and Conclusions of the Board

After considering extensive evidence presented in the *Express Service Investigation*, the Board concluded that neither a continuation of the existing arrangement nor the restructuring proposed by REA would be in the public interest (Pet. App. 100a-123a).

REA acknowledged that it was experiencing acute financial difficulty, due primarily to the substantial decrease in traffic volume over the previous several years (Pet. App. 98a-100a, 112a-113a).[7] In light of this, the Board found that "the basic realities of the situation offer no practicable way of retaining the present air express arrangement" (Pet. App. 111a; see *id.* at 91a, 95a, 110-113a).

After examining REA's proposals to restructure the air express arrangement, the Board concluded that these "would raise a host of problems * * *" (Pet. App. 113a; see *id.* at 113a-119a). As to the proposal to grant REA dual authority to provide air express service and act as a freight forwarder, the Board found that such authority would be contrary to the public interest because it would have deleterious effects on the market (Pet. App. 118a):

> If this helped REA to dominate the entire indirect carrier industry, as it might, it would inevitably lessen competition among existing forwarders and,

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[7] REA's surface traffic declined from 47 million shipments in 1967 to 15 million shipments only three years later (Pet. App. 99a). Air express traffic had shown only a 3 percent increase from 1966 to 1970, in comparison with a 168 percent increase during the same period for air freight forwarding shipments (Pet. App. 99a). REA's last profitable year was 1965 when it earned about $1,000,000. It lost about $76 million from 1966 through 1973. The first quarter of 1974 reflected the same pattern. Air express shipments in April 1974 declined 15 percent. REA continued to survive only by selling off capital assets amounting to more than $48,000,000 (Pet. App. 100a).

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> perhaps, sap the vitality of that group. Of course, that would thwart this agency's primary goal in licensing REA and the forwarders — namely, to promote the vigorous development of air freight.

As to REA's request for independent rate authority, the Board found that such authority would "virtually assure bitter and continuing disputes between * * * REA and the airlines," create "grave regulatory problems," adversely affect small package shippers now largely dependent on REA, and impair the operations of air freight forwarders (Pet. App. 115a-117a).

In any event, the Board found that approving REA's proposal would be "futile," because the airlines had "served notice that they would not become parties to any express agreement" with REA (Pet. App. 119a), if REA were given either dual authority or independent ratemaking authority (see also Pet. App. 92a, 114a-115a). Since the existence of air express service depends on the maintenance of an agreement between REA and the airlines—two parties whose divergent interests had become an almost insuperable source of friction (see Pet. App. 111a)—the Board concluded that REA's proposals, in addition to raising "a host of problems, * * * simply would not work" (Pet. App. 113a).

The Board recognized nevertheless that expanding REA's authority might be justified if the continued existence of air express service was "so vital that it outweighs all other considerations" (Pet. App. 93a). But the Board found this not to be the case because, with the development of air freight and air freight forwarder services, the unique advantages once provided by REA's service had "withered away" (Pet. App. 93a). Based on an extensive comparison of the competing services, the Board found that while REA's services remained attractive for small shipments moving relatively short distances

(Pet. App. 97a), air express fulfilled no unique service needs in terms of the speed of delivery (Pet. App. 100a-105a), or of geographic or commodity coverage (Pet. App. 105a-110a).[8]

Accordingly, the Board found that "cessation of air express service [would] have no material impact on the public" (Pet. App. 110a). Indeed, because REA's exclusive authority to provide air express service represented "an anomaly in an air transport system enjoined to preserve '[c]ompetition to the extent necessary * * *' (49 U.S.C. 1302)" (Pet. App. 119a-120a), the Board recognized certain affirmative advantages for the industry in terminating that authority and in thereby opening the small market which had utilized air express to free competitive forces (Pet. App. 91a, 95a, 120a).[9]

The Board therefore terminated its approval of the air express agreements between REA and the airlines, and withdrew REA's temporary exemption authority (Pet. App. 128a-130a). However, the Board authorized REA to engage in air transportation as a domestic air freight forwarder (see Pet. App. 129a), both because the Board believed that REA's prospects would be greatly enhanced

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[8]The priority treatment accorded to air express shipments was found to have limited impact because only 1.7 percent of all flights surveyed departed without sufficient space to accommodate the tendered cargo (Pet. App. 102a-104a). Although REA has traditionally served more cities than its air freight competitors, the Board found that its current financial condition would result in a consolidation of services and thus a loss of REA's broad geographic coverage (Pet. App. 105a-107a). The forwarders and air carriers provide coextensive commodity coverage with the exception of 18 items. The Board observed that REA could continue to transport those 18 items as a freight forwarder and that the carriers have begun to transport those items (Pet. App. 108a-110a).

[9]The Board recognized that certain limited types of cargo require highly expedited delivery and ordered the air carriers to publish high-priority tariffs for such cargoes (Pet. App. 104a-105a, 123a-125a).

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as a provider of such services, and because granting REA such authority would serve the public interest (Pet. App. 95a, 121a-123a).[10]

REA sought reconsideration of the Board's order. The petition was denied (Pet. App. 65a-86a), except to the extent that REA's authority to provide air express services was extended until no later than August 1, 1974 (Pet. App. 86a).

C. Review in the Court of Appeals

REA then filed a petition for review in the United States Court of Appeals for the Second Circuit. On July 16, 1974, the court stayed the Board's orders pending its review (Pet. App. 10a).

While the review proceedings were pending, REA and some of the air carriers reached a new air express agreement and filed it with the Board. The court of appeals remanded the proceeding to the Board (while retaining jurisdiction) to enable it to reexamine its decision in light of the new agreement. On remand, the Board disapproved the new agreement (Pet. App. 31a-45a), finding that it perpetuated an arrangement that no longer afforded the public any unique service and that it gave REA a monopoly advantage that thwarted development of modern and superior priority air freight service. The Board also found that developments in the interim had buttressed its original decision. The withdrawal of several air carriers from the arrangement, for example, ended REA's nationwide coverage. Moreover, REA had since filed a

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[10]The Board issued a contemporaneous decision in the *Air Express Rate Investigation* case (Pet. App. 51a-64a). After noting "major gaps" (Pet. App. 53a) in the financial data submitted to it, the Board decided that some issues were moot in light of the *Service Investigation* decision and that other issues required further administrative proceedings.

bankruptcy petition, which, the Board concluded, made "the new air express agreement * * * no more stable than the earlier arrangement was at the time of our original decision" (Pet. App. 37a). The Board denied REA's petition for reconsideration (Pet. App. 23a-30a).

The court of appeals affirmed the Board's decision (Pet. App. 7a-22a), holding that the Board's findings were supported by substantial evidence and that its conclusions were reasonable. The court ruled that the Board had (Pet. App. 18a)

> observed its responsibilities to REA and to the public, making its "public interest" determinations only after weighing and balancing the essential relevant factors which it was obligated to consider: the shippers' needs, the cargo offered for transport, the nature and extent of the markets and commodities affected, and the characteristics of the three competing services.

D. Subsequent Developments

After the court of appeals' decision, REA was adjudicated a bankrupt by order of the United States District Court for the Southern District of New York, entered November 6, 1975 (see Pet. 8). The trustee was directed to liquidate assets of the company, and he has begun to do so. By the express terms of the agreement under which REA and the airlines had been operating pending the conclusion of this litigation (see note 6, *supra*), the agreement was "terminate[d] forthwith" by REA's bankruptcy.

ARGUMENT

In view of the bankruptcy adjudication and liquidation, this case presents no issues of continuing importance warranting review by this Court. In any event, the court

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of appeals correctly concluded that the Board considered all of the relevant factors and that the Board's determinations were supported by substantial evidence. 49 U.S.C. 1486(e); see *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

1. Petitioner contends (Pet. 11-15) that the Board did not adequately consider the economic impact of terminating REA's temporary exemption authority. But the Board's decision was based upon extensive consideration of the probable effect, both economic and otherwise, of various alternatives upon REA, freight forwarders, and shippers. The Board ultimately concluded that the alternative it selected would likely lead to the most efficient and economical air freight services.[11] The Board knew that REA's air express service was less expensive for some classes of shippers (*e.g.*, small package, short haul) than were other forms of service (Pet. App. 94a, 97a, 110a). But the Board also knew that this was at best a short-term benefit from an operation that already was on "the brink of extinction" (Pet. App. 91a; see *id.* at 75a, 36a-

[11]Petitioner relies upon *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (cited at Pet. 13), in which the Interstate Commerce Commission refused to authorize a competing motor carrier service on the ground that the present rail service was adequate, without the Commission having given sufficient consideration to the inherent advantages of motor carrier service. Here, in contrast, the Board refused to continue the exceptional authorization of a form of antiquated service that now thwarts the development of air freight forwarder and other alternative services. In any event, as noted by the court below (Pet. App. 19a-20a), the Board did examine the cost of air express service in determining that the continuation of such service was no longer in the public interest.

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37a).[12] This benefit, the Board concluded, was outweighed by the benefits to the public from abandonment of the deteriorating service (see, *e.g.*, Pet. App. 74a-75a, 94a-95a, 111a).

Petitioner also contends (Pet. 15) that the Board's decision to order the air carriers to develop new forms of priority cargo service (see note 9, *supra*) deprived REA of a comparative hearing under *Ashbacker Radio Co.* v. *Federal Communications Commission*, 326 U.S. 327. At the extensive hearing conducted in this case, the Board fully examined REA's request for continued and expanded authority to conduct air express service, and compared that request with currently available alternative services. Moreover, as the court of appeals pointed out (Pet. App. 21a), "the high-priority service contemplated by the Board is not intended as a replacement of air express service but as an entirely new type of fast, airport-to-airport service not presently available * * *." Therefore, this is not an instance in which an agency has authorized a service without first affording a hearing to the competing applicant.

2. Petitioner further contends (Pet. 15-20) that in terminating REA's express service, the Board failed to comply with the National Environmental Policy Act. This contention apparently is based on petitioner's belief that its air express operations were more efficient than

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[12]The Board did not abuse its discretion in refusing to defer termination of express service until it could evaluate the effect of a final decision in the *Rates* case upon the cost of REA's express service. The relevant economic factors were fully explored in the *Service* case, and, in any event, the economic factor was merely one of several reasons for the Board's decision.

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other forms of air freight.[13] As petitioner concedes (Pet. 18), this claim was not presented to the Board in a timely manner. Moreover, REA mentioned the point only in passing (in a footnote) in its brief to the court of appeals. There is no reason for this Court to consider the claim.

3. Contrary to petitioner's contention (Pet. 20-28), the Board was not insensitive to REA's financial difficulties. In determining, after carefully analyzing the evidence presented, that REA's monopoly position was no longer in the public interest, the Board acted within its statutory authority. From the outset of these proceedings, the Board recognized that REA was on the brink of collapse. The Board accepted REA's representation that the air express arrangement in existence at the time was not financially feasible (Pet. App. 91a). It also recognized that continued air express service was no longer practical in view of the deterioration in relations between REA and the air carriers (Pet. App. 110a-113a). In light of this understanding, the Board's decisions were based not only on the belief that REA's exemption was contrary to the public interest, but also on the determination that REA's operation as an air freight forwarder assured it the best chance for economic survival (Pet. App. 76a-85a, 95a, 123a).[14]

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[13]The Board's finding that substantial efficiencies would be achieved by utilizing other forms of air freight service undermines petitioner's assertions.

[14]Petitioner suggests (Pet. 25-28) that due process required additional hearings by the Board. Prior to making its initial decision, the Board conducted extensive hearings as a part of a massive investigation into the continuing viability of REA's air express service. Due process requires nothing more. The Board, moreover, correctly viewed the court of appeals' remand (to consider the effect on the Board's decision of the new proposed agreement between REA and the airlines) as not requiring additional hearings (Pet. App. 27a-28a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1976.

APPENDIX

Relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 *et seq.*:

TITLE I — GENERAL PROVISIONS

DEFINITIONS

Sec. 101. [49 U.S.C. 1301.] As used in this Act, unless the context otherwise requires—

* * * * *

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

* * * * *

TITLE IV — AIR CARRIER ECONOMIC REGULATION

* * * * *

POOLING AND OTHER AGREEMENTS

FILING OF AGREEMENTS REQUIRED

Sec. 412. [49 U.S.C. 1382.] (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalities, bonds, or otherwise) affecting air transportation and in force on the effective data of this section or hearafter entered into, or any modification

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or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

APPROVAL BY BOARD

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

* * * * *

TITLE X — PROCEDURE

* * * * *

JUDICIAL REVIEW OF ORDERS

* * * * *

SEC. 1006. [49 U.S.C. 1486.]

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FINDINGS OF FACT CONCLUSIVE

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so, urged, unless there were reasonable grounds for failure to do so.